

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID DELAITTRE,

Plaintiff,

v.

NANCY A. BERRYHILL, in her official
capacity as Acting Commissioner of the
UNITED STATES SOCIAL
SECURITY ADMINISTRATION,

Defendant.

Case No. C15-1905-RAJ

ORDER

This matter comes before the Court on the parties' motions for partial summary judgment. Dkt. ## 30, 34. Both motions are opposed. Dkt. ## 39, 46. For the reasons that follow, the Court **DENIES** Plaintiff's Motion (Dkt. # 30), and **GRANTS in part** and **DENIES in part** Defendant's Motion (Dkt. # 34).

I. BACKGROUND

Plaintiff David DeLaittre is the Regional Chief Administrative Law Judge ("RCALJ") for Region 10 in the Office of Hearing Operations (formerly the Office of Disability Adjudication and Review) ("ODAR") for the Social Security Administration ("SSA") in Seattle, Washington. Dkt. # 5 at ¶ 4. He is a 71-year-old blind male. Dkt. # 5 ¶ 8. Plaintiff became an Administrative Law Judge ("ALJ") with the SSA on July 14, 1991. He became the RCALJ for Region 10 on or about July 31,

1 2000. *Id.*; Dkt. # 36 Ex. 1. As RCALJ for Region 10, he is the head of ODAR for
2 Region 10, and is in the supervisory chain of all employees in Region 10 who work for
3 ODAR. *Id.*

4 In 2013, a female subordinate employee made a complaint of harassment and
5 hostile work environment against Plaintiff. The SSA then began an investigation into
6 the complaint. Dkt. # 5; Dkt. # 36 Ex. 1. On December 27, 2013, Deputy Chief
7 Administrative Law Judge John Allen, Plaintiff's supervisor, placed Plaintiff on
8 administrative leave pending disciplinary action. Dkt. # 5 ¶ 29. During the course of
9 the investigation, other subordinate employees and a regional executive described
10 additional instances in which they alleged that Plaintiff engaged in sexual harassment
11 of other employees or engaged in other inappropriate behavior. Dkt. # 5 ¶ 24; Dkt. #
12 36 Ex. 1. Specifically, these employees alleged that Plaintiff made comments
13 stereotyping employees based on their sex, race, and national origin, disclosed
14 employees' medical conditions to subordinates who did not have a need to know,
15 grabbed and touched a female employee inappropriately in an elevator, and told a
16 female regional executive that she was so beautiful that she could be his girlfriend.
17 Dkt. # 36 Ex. 1. Investigators also learned that Plaintiff was improperly using the
18 parking pass assigned to the RCALJ position by letting two subordinate employees use
19 the parking pass in exchange for occasionally driving Plaintiff to various places during
20 and outside of work time. *Id.* Judge Allen interviewed Plaintiff during the
21 investigation regarding these allegations. Dkt. # 36 Ex. D. On February 18, 2014,
22 Plaintiff wrote a letter to Judge Allen detailing alleged defects and deficiencies in
23 Defendant's investigation. Dkt. # 5 ¶¶ 40, 41. Judge Allen then forwarded this letter
24 and the attachments to the investigators. Dkt. # 36 Ex. D.

25 On or about December 12, 2014, Judge Allen informed Plaintiff that his
26 executive assistant, Kathleen Williams, would no longer be assisting him in duties that

1 provided a reasonable accommodation for his disability, but would instead be working
2 on assignments specific to her position as an executive assistant. Judge Allen noted
3 that an additional individual would be hired to assist Plaintiff. Dkt. # 1 Ex. C. On
4 February 19, 2015, after review of the results of the investigation, Chief
5 Administrative Law Judge Debra Bice determined that the incidents alleged in the
6 complaint did not show that Plaintiff subjected the female subordinate employee to a
7 hostile work environment or harassment as defined by law. Dkt. # 36 Ex. 1.
8 However, based on the statements made by employees in their investigative
9 interviews, the CALJ Bice decided to seek a reduction in Plaintiff's grade for conduct
10 unbecoming a federal employee. *Id.* CALJ Bice also temporarily removed Plaintiff's
11 supervisory duties. Dkt. # 36 Ex. E. On March 23, 2015, Judge Allen informed
12 Plaintiff that Defendant had determined that he was not using the parking pass
13 assigned to the RCALJ position and asked that it be returned. Dkt. # 1 Ex. D.

14 In October 2015, the Merit System Protection Board ("MSPB") held a hearing
15 on the SSA's charge that there was good cause for a reduction in Plaintiff's grade.
16 Plaintiff was present at the hearing and represented by counsel. During the hearing,
17 Susan Brown, the Regional Management Officer of Region 10, and Lorraine Vega,
18 Regional Director of Operations and Administration of Region 10, gave testimony in
19 support of the SSA's charge. In her testimony, Vega alleged that Plaintiff gave her an
20 "unwelcomed hug and kissed her on the cheek in the elevator at the office." Dkt. # 36
21 Ex. 1.

22 On December 4, 2015, prior to the issuance of the MSPB's decision, Plaintiff
23 filed this lawsuit. The Complaint was then circulated in the region. Dkt. # 32
24 Exs. C, D. Vega later stated that she felt that the Complaint contained "very negative
25 and damaging information about [her], which [she] consider[s] to be slander." *Id.*
26 That same day, Vega made a complaint by email to executives at ODAR that Plaintiff

1 was harassing her for participating in the MSPB proceedings. Dkt. # 47 Ex. 1.
2 Around this same time, Reginald Jackson, senior advisor to the Deputy Commissioner,
3 relayed to Assistant Deputy Commissioner for ODAR, Donna Calvert, that Brown had
4 also complained that Plaintiff was harassing her. *Id.*; Dkt. # 47 Ex. 2.

5 On December 7, 2015, Vega met with Calvert and Deputy Commissioner
6 Theresa Gruber regarding her allegations. Vega told them that Plaintiff was
7 intentionally walking by her office and “lurking” outside her office door in an attempt
8 to intimidate and harass her. Dkt. 47 Ex. 2. Vega indicated that this alleged
9 harassment was not verbal, but limited to her allegation that Plaintiff was frequently
10 listening and lingering outside of her office. Dkt. # 32 Ex. E. Calvert had also heard
11 from Acting RCALJ Lyle Olson that the regional office was experiencing a high level
12 of tension. Dkt. # 48. After the meeting, Calvert decided to refer the complaint to a
13 Harassment Prevention Officer (“HPO”) in the Office of Labor Management and
14 Employee Relations (“OLMER”). Dkt. 47 Ex. 2. Calvert was not involved with the
15 subsequent investigation and made no attempt to ascertain the truthfulness of the
16 allegations. *Id.* Calvert also decided to place Plaintiff on administrative leave during
17 the investigation due to the reports of tension in the regional office and in an effort to
18 follow Defendant’s “general practice of separating accusers from the accused.” Dkt. #
19 48. Judge Allen informed Plaintiff of this decision by email on December 18, 2015.
20 Dkt. # 5 Ex. F.

21 In December 2015, HPO Celene Wilson received Vega’s harassment complaint
22 and was advised that Brown had made an oral complaint with similar allegations.
23 Dkt. # 49. After interviewing both Brown and Vega, she determined that an
24 investigation was necessary and assigned two investigators and an Independent
25 Reviewer to the investigation. The investigators interviewed a total of ten people,
26 including people mentioned or suggested by witnesses or people that were physically

1 located where they could have heard or seen the incidents described by other
2 witnesses. Dkt. # 50. After the interviews, the investigators prepared a first-party
3 statement in essay form to document the witnesses' responses during the interview.
4 These statements were given to the witnesses to review, make suggested changes in
5 pen and ink, and then to sign. Wilson then provided the file with the witness
6 statements to the Independent Reviewer for her determination. Dkt. # 49. After
7 reviewing the information from the investigation, the Independent Reviewer
8 determined that Plaintiff's alleged conduct did not rise to the level of harassment so as
9 to constitute a hostile work environment under the law. Dkt. # 32 Ex. K.

10 After the Independent Reviewer made her determination, Calvert was informed
11 of the outcome and was provided with the witness statements. Calvert read the
12 statements and spoke to Judge Olsen, Judge Allen, and CALJ Bice. Olson told Calvert
13 that, based on his own personal observations, he believed Plaintiff was walking by the
14 offices deliberately and pausing outside of manager's offices despite having alternative
15 routes to use the restroom or any other place Plaintiff would need to be with the
16 frequency with which it was happening. Dkt. # 48. After reading the witness
17 statements and speaking to Judge Olson, Calvert concluded that the regional office
18 was experiencing a large amount of tension that needed to be addressed. Calvert also
19 concluded that Plaintiff was "lurking" outside offices. Calvert then made the decision
20 to alleviate that tension by moving Plaintiff to an office outside of ODAR. *Id.*

21 After Plaintiff moved offices, it was brought to Calvert's attention that the
22 office had noise or vibration issues and that Plaintiff needed to be moved to a new
23 office. ODAR had no other space available in the same building as the regional office.
24 Calvert authorized the work to determine whether the noise or vibration issues could
25 be mitigated. When it was determined that the issues could not be solved, she directed
26 the current Acting RCALJ Rolph to locate alternative space. Calvert also contacted

1 Regional Commissioner Stanley Friendship for assistance locating alternative space.
2 Two possible spaces were identified, and Plaintiff was offered the choice between
3 those two. Calvert then authorized the expenditures to build out the selected space.
4 *Id.* In February 2016, Plaintiff was advised that his office would be relocated and that
5 the National Hearing Center would be notified that he would be returning to duty and
6 would be available to resume hearing and deciding cases. Dkt. # 32 Ex. L. By March
7 1, 2016, Plaintiff had returned to his duties. Dkt. # 32 Ex. S. On April 13, 2016, the
8 MSPB found that the SSA met its burden of proving by a preponderance of evidence
9 that Plaintiff engaged in “conduct unbecoming a federal employee and that good cause
10 exists to discipline [Plaintiff].” Dkt. # 36 Ex. 1.

11 On or about November 26, 2014, Plaintiff filed a complaint with the EEO
12 alleging discrimination based on age, sex, and disability, and retaliation. Dkt. # 5 ¶ 50.
13 On January 19, 2016, Plaintiff filed an Amended Complaint against Defendant
14 alleging discrimination based on his disability, age, sex, and religion. Plaintiff also
15 alleges that Defendant violated his due process rights, engaged in retaliation against
16 him, and failed to accommodate his disability. Dkt. # 5. On October 30, 2017,
17 Plaintiff filed a motion for summary judgment of his retaliation claim. Dkt. # 30. On
18 October 31, 2017, Defendant filed a motion for summary judgment of Plaintiff’s
19 claims for discrimination based on his religion and age, due process, and his claim that
20 the SSA failed to accommodate his disability. Dkt. # 34. In Defendant’s Motion,
21 Defendant represents that Plaintiff is no longer pursuing his claims for discrimination
22 based on his religion or age. Dkt. # 34; Dkt. # 35. Plaintiff does not dispute this
23 representation. Therefore, Defendant’s motion is granted as to Plaintiff’s claims of
24 age and religious discrimination¹. Dkt. # 34.

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¹ As the Court interprets this as a voluntary dismissal, this should not be construed as a
dismissal based on the merits of Plaintiff’s claims.

II. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets the initial burden, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

However, the court need not, and will not, "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also, White v. McDonnell-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the court need not "speculate on which portion of the record the nonmoving party relies, nor is it obliged to wade through and search the entire record for some specific facts that might support the nonmoving party's claim"). The opposing party must present significant and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

1 Uncorroborated allegations and “self-serving testimony” will not create a genuine
2 issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th
3 Cir. 2002); *T.W. Elec. Serv. V. Pac Elec. Contractors Ass’n*, 809 F. 2d 626, 630 (9th
4 Cir. 1987).

5 **III. DISCUSSION**

6 As a preliminary matter, Defendant moves to strike portions of Plaintiff’s
7 declarations submitted in support of his Motion and in opposition to Defendant’s
8 Motion, pursuant to Local Rule 7(g). Defendant argues that several paragraphs
9 contain legal argument and conclusions, inadmissible hearsay, lack foundation, and are
10 irrelevant to issues raised by Plaintiff’s Motion for Summary Judgment. To the extent
11 that Plaintiff’s declaration contains any improper legal argument or conclusions or
12 inadmissible hearsay, it will not be considered for the purposes of Plaintiff’s Motion
13 for Summary Judgment. As to the statements that Defendant argues lack foundation,
14 “[t]o survive summary judgment, a party does not necessarily have to produce
15 evidence in a form that would be admissible at trial, as long as the party satisfies the
16 requirements of Federal Rules of Civil Procedure 56.” *Block v. City of Los Angeles*,
17 253 F.3d 410, 418–19 (9th Cir. 2001). The Court makes no judgment on whether
18 Plaintiff will be able to lay a foundation for these statements at trial, but will consider
19 statements that meet the requirements of Rule 56 for the purposes of this Motion.
20 Finally, to the extent that Plaintiff’s declaration contains irrelevant information for the
21 purposes of Plaintiff’s Motion, or constitutes speculative and conclusory allegations, it
22 will not be considered here.

23 **A. Retaliation Claim**

24 The Court analyzes Plaintiff’s state and federal retaliation claims under the
25 same framework. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065-1066 (9th Cir.
26 2003) (finding that Washington courts look to federal law when analyzing retaliation

1 claims, and utilizing the three-part burden shifting test described in *McDonnell*
2 *Douglas Corp. v. Green*, 411 U.S. 792 (1973)). To establish a prima facie case of
3 retaliation, a plaintiff must demonstrate that (1) he engaged in a statutorily protected
4 activity, (2) defendants took some adverse employment action against him, and (3)
5 there is a causal connection between the protected activity and the adverse
6 employment action. *Id.* at 1065-1066; *Corville v. Cobarc Servs., Inc.*, 869 P.2d 1103,
7 1105 (Wash. Ct. App. 1994). If a plaintiff establishes a prima facie case, the
8 evidentiary burden shifts to the employer to produce admissible evidence of a
9 legitimate, nondiscriminatory reason for the discharge. *Stegall*, 350 F.3d at 1066;
10 *Hollenback v. Shriners Hospitals for Children*, 206 P.3d 337, 344 (Wash. Ct. App.
11 2009). If the employer meets its burden, the presumption is removed and the
12 employee must then establish a genuine issue of material fact as to pretext. *Stegall*,
13 350 F.3d at 1066; *Hollenback*, 206 P.3d at 344.

14 The bias of an ultimate decisionmaker's subordinate can be imputed to the
15 decisionmaker if, "a subordinate, in response to a plaintiff's protected activity, sets in
16 motion a proceeding by an independent decisionmaker that leads to an adverse
17 employment action" and if the plaintiff can prove that "the allegedly independent
18 adverse employment decision was not actually independent because the biased
19 subordinate influenced or was involved in the decision or decisionmaking process."
20 *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007); *see also Staub v. Proctor*
21 *Hospital*, 562 U.S. 411 (2011); *Bergene v. Salt River Project Agric. Improvement &*
22 *Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Galdamez v. Potter*, 415 F.3d 1015,
23 1026 n. 9 (9th Cir. 2005); *Lakeside-Scott v. Multnomah County*, 556 F.3d 797 (9th Cir.
24 2009). Plaintiff argues that Vega had "clear animus" toward him due to his disability
25 and need for accommodation and that this animus led to her complaint of harassment.
26 Plaintiff further argues that he was put on administrative leave, removed from his

1 office and placed in an unsuitable alternative office, and was limited to only hearing
2 cases by video as a direct result of these allegations. Dkt. # 30. The parties do not
3 dispute whether Plaintiff engaged in a statutorily protected activity.

4 The Court finds that there is a genuine issue of material fact as to the causal
5 connection between Plaintiff's protected activity and the alleged adverse employment
6 actions. To establish the element of causation in a subordinate bias case where the
7 investigation that led to the adverse employment action was initiated by the biased
8 subordinate, Plaintiff must show that "the allegedly independent adverse employment
9 decision was not actually independent because the biased subordinate influenced or
10 was involved in the decision or the investigation thereto." *Poland*, 494 F.3d at 1184.
11 First, there is an issue of fact as to whether the investigation into Plaintiff's behavior
12 was initiated by Vega, as Plaintiff alleges. Although Calvert stated that she made the
13 decision to refer Vega's complaint to OLMER after her meeting with Vega and
14 Deputy Commissioner Theresa Gruber, both Vega and Brown made complaints of
15 harassment. Calvert also stated that she took into account observations shared by
16 Olson about office tension. It is unclear exactly when Brown made her initial verbal
17 complaint, or what her complaint entailed, only that that the allegations in Brown's
18 complaint sounded similar to the allegations made by Vega. Further, the email sent by
19 CALJ Bice initiating the referral to OLMER for possible investigation forwarded an
20 email from Vega as the "alleging employee". Dkt. # 32 Ex. A. It is possible that
21 Vega's complaint was the impetus for the investigation, and it is also possible that
22 Calvert was influenced by both Brown and Vega's complaints and the report from
23 Judge Olsen.

24 Even if it was clear that the investigation was initiated by Vega, the Court finds
25 that there is also an issue of material fact as to whether she influenced or was involved
26 with the adverse employment decision or the investigation, or whether the adverse

1 employment decision was the result of an “entirely independent investigation”. *See*
2 *Poland*, 494 F.3d at 1183 (“[I]f an adverse employment action is the consequence of
3 an entirely independent investigation by an employer, the animus of the retaliating
4 employee is not imputed to the employer.”). In *Poland*, the biased subordinate asked
5 his employer to undertake an administrative inquiry into the plaintiff, provided a
6 lengthy memo outlining the plaintiff’s numerous incidents of malfeasance and
7 provided a list of twenty-one witnesses to be interviewed. The inquiry panel then
8 interviewed these twenty-one witnesses and consulted notes from another employee
9 provided by the biased subordinate. The Ninth Circuit concluded that the biased
10 subordinate had a “pervasive influence” on the administrative inquiry that led to the
11 adverse employment action. Here, while it is possible that Vega’s complaints initiated
12 the investigation, there is a question of fact as to whether her involvement in the
13 investigation was “pervasive”. According to HPO Wilson, she determined an
14 investigation was necessary after interviewing both Brown and Vega. Vega was also
15 interviewed by the investigators. There is no other evidence on the record that Vega
16 was involved in any other way with the investigation, or any decisions leading to the
17 alleged adverse employment actions. Vega was one of ten witnesses interviewed
18 during the course of the investigation. There is also no evidence that she controlled
19 the course of the investigation or which witnesses should interviewed. Therefore,
20 there is a genuine issue of material fact such that summary judgment of Plaintiff’s
21 retaliation claim would be inappropriate. Plaintiff’s Motion for Partial Summary
22 Judgment is **DENIED**. Dkt. # 30.

23 B. Due Process

24 Plaintiff alleges that Defendant took adverse employment action against him
25 without “prompt, thorough, and impartial investigation” in violation of the Fifth
26 Amendment. Dkt. # 5. Plaintiff also argues that he was deprived of his due process

1 rights throughout both investigations and because Defendant's failed to inform him of
2 the accusations against him in the MSPB complaint and throughout the MSPB hearing.
3 However, to state a claim for due process under the Fifth Amendment, Plaintiff must
4 have a "constitutionally protected liberty or property interest at stake". *Nevada Dep't*
5 *of Corr. v. Greene*, 648 F.3d 1014, 1019 (9th Cir. 2011). "Property interests are not
6 created by the Constitution, 'they are created and their dimensions are defined by
7 existing rules or understandings that stem from an independent source such as state
8 law....'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487,
9 1491, 84 L. Ed. 2d 494 (1985) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577,
10 92 S.Ct. 2701, 2708–2709, 33 L.Ed.2d 548 (1972)). Plaintiff argues that he had a
11 property interest in his duties and position as RCALJ, and that this position was taken
12 away from him without proper due process.

13 While a federal employee can have a property interest in his continued
14 employment, Plaintiff cites to no case law supporting his argument that an ALJ has a
15 property interest in his designation as RCALJ. *Loudermill*, 470 U.S. at 538. Plaintiff
16 relies on the holding in *Loudermill* to support his argument that federal public
17 employees are guaranteed the right to specific notice of charges against them and an
18 opportunity to respond prior to being deprived of their employment. However, the
19 holding in *Loudermill* is inapposite to the facts at issue here. *Loudermill* involves the
20 due process rights allotted to a federal employee prior to discharge. Plaintiff was not
21 discharged and is still employed by Defendant. Where an ALJ serves as a supervisory
22 ALJ at the will and pleasure of his employer, he does not have a property interest in
23 the continued designation of supervisor. *See Bridges v. Comm'r Soc. Sec.*, 672 F.
24 App'x 162, 168 (3d Cir. 2016), *cert. denied sub nom. Bridges v. Berryhill*, 138 S. Ct.
25 200, 199 L. Ed. 2d 117 (2017) (finding that the plaintiff did not have a property
26 interest in his designation as Hearing Office Chief Administrative Law Judge).

1 Plaintiff also argues that he suffered reputational harm due to Defendant's
2 actions, citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) for the
3 proposition that he has a right to "notice and an opportunity to be heard" because his
4 reputation is at stake. Plaintiff argues that he was unaware that Vega had made
5 allegations of sexual assault or harassment and that he was denied the opportunity to
6 respond to rumors regarding these allegations because he was restricted from speaking
7 to other regional employees about the investigation. However, "procedural due
8 process protections apply to reputational harm only when a plaintiff suffers stigma
9 from governmental action plus alteration or extinguishment of 'right or status
10 previously recognized by state law.'" *Humphries v. Cty. of Los Angeles*, 554 F.3d
11 1170, 1185 (9th Cir. 2009), *as amended* (Jan. 30, 2009) (quoting *Paul v. Davis*, 424
12 U.S. 693, 711, 96 S. Ct. 1155 (1976)). While accusations of sexual harassment or
13 assault are undoubtedly stigmatizing, Plaintiff fails to identify a right or status
14 previously recognized by state law that was altered or extinguished by Defendant's
15 actions. Therefore, Defendant's Motion for Summary Judgment of Plaintiff's due
16 process claim is **GRANTED**.

17 C. Failure to Accommodate

18 Under the Rehabilitation Act², public entities are required to make "reasonable
19 modifications in policies, practices, or procedures when modifications are necessary to
20 avoid discrimination on the basis of disability, unless the public entity can demonstrate
21 that making the modifications would fundamentally alter the nature of the service,
22 program or activity." 29 C.F.R. § 35.130(b)(7). Plaintiff bears the burden of showing
23 that he is disabled within the meaning of the Rehabilitation Act. If he is disabled and
24 accommodation to his disability is required to enable him to perform essential job
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² The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act ("ADA"). *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004)

1 functions, plaintiff has the burden of producing evidence that reasonable
2 accommodation is possible. *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002);
3 *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993). The burden then
4 shifts to Defendant to produce rebuttal evidence that the requested accommodation
5 was not reasonable. *Id.*

6 Defendant argues first that Plaintiff failed to administratively exhaust all of his
7 specific claims regarding Defendant's failure to accommodate his disability, and is
8 thus limited to his claims regarding Defendant's modification of Plaintiff's
9 assistant/reader and the removal of Plaintiff's parking pass. Defendant is correct that a
10 federal employee must exhaust her available administrative remedies prior to bringing
11 a discrimination claim in federal court under either Title VII of the Civil Rights Act or
12 the Rehabilitation Act. 29 C.F.R. § 1614.105(a); *Shepard v. Winter*, 327 F. App'x 691,
13 693 (9th Cir. 2009). However, courts must construe the scope of the EEOC charge
14 liberally. Plaintiff's court action is not limited to the EEOC charge itself, but whether
15 the original EEOC investigation would have encompassed the additional charges. This
16 includes allegations occurring before and after the filing of the EEOC charge. *See*
17 *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). While Plaintiff's additional
18 allegations regarding Defendant's failure to accommodate his disability may not be
19 specifically included in his EEOC charge, these allegations are sufficiently "like or
20 reasonably related to" Plaintiff's EEOC allegations to establish this Court's
21 jurisdiction. *Id.*

22 It is undisputed that Plaintiff disabled and that accommodation to his disability
23 is required to enable him to perform essential job functions. Plaintiff alleges that
24 Defendant failed to accommodate his disability by removing or modifying Plaintiff's
25 existing reasonable accommodations, including his assistant/reader, his office space,
26 and his parking pass. Plaintiff argues that Defendant failed to accommodate him when

1 they removed him from his office to a new, unsuitable office space because of
2 concerns that his tendency to linger outside offices could be perceived as disruptive.
3 Dkt. # 32 Ex. 12. At issue is not whether Defendant improperly moved Plaintiff from
4 his previous office, but whether Defendant failed to reasonably accommodate
5 Defendant's request for a quiet office. As noted above, after Plaintiff indicated that his
6 new office was unsuitable, Defendant eventually arranged for Plaintiff to be moved to
7 a different space. Plaintiff does not indicate whether this current office is also
8 unsuitable, only that his previous office was distant and noisy. It is unclear from the
9 record whether this second move accommodated Plaintiff's request for a quiet office.

10 Plaintiff also argues that Defendant failed to accommodate Plaintiff's need for a
11 sighted executive assistant because they attempted to remove Kathleen Williams as
12 Plaintiff's executive assistant/reader. Plaintiff testified in his deposition that despite
13 this attempt, Williams was never removed as his reader, but eventually had to retire
14 due to poor health. Dkt. # 35 Ex. 1. After Williams ceased working as Plaintiff's
15 reader, the agency provided another person to serve as his reader until a permanent
16 replacement was found. *Id.* When providing an employee with a reasonable
17 accommodation, "[a]n employer is not obligated to provide an employee the
18 accommodation he requests or prefers, the employer need only provide some
19 reasonable accommodation." *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080,
20 1089 (9th Cir. 2002). As Defendant continuously provided Plaintiff with a reader,
21 there is no evidence that Defendant refused to reasonably accommodate Plaintiff in
22 this way.

23 Finally, Plaintiff argues that Defendant's removal of his parking pass was a
24 failure to accommodate his need to be able to commute to work in a reliable and safe
25 manner. Dkt. # 5 ¶ 59. Plaintiff contends that he provided this pass to two co-workers
26 who routinely drove him to work so that he would not have to rely on family support

1 or public transportation for his commute. *Id.* Defendant argues that Plaintiff gave this
2 parking pass to his friends, and that these employees only occasionally drove him and
3 used the pass exclusively for themselves the rest of the time. One employee drove him
4 to work and occasionally drove him home and another drove him home and “seldom”
5 drove him to work. Dkt. 53 # Ex. G. Defendant further argues that it was not required
6 to allow Plaintiff to use the pass in this way, or to allow Plaintiff to use a subordinate
7 to drive him to and from work. At issue is not whether Defendant believed that
8 Plaintiff was improperly using the parking pass, but whether Plaintiff’s removal of the
9 parking pass was a failure to reasonably accommodate his disability. While Plaintiff is
10 able to commute by bus or through family support, “an employer has a duty to
11 accommodate an employee’s limitations in getting to and from work.” *Humphrey v.*
12 *Memorial Hospitals Ass’n*, 239 F.3d 1128, 1135 (9th Cir. 2001). The Court finds that
13 there is an issue of material fact as to whether Plaintiff’s use of a parking pass in
14 exchange for rides to work is a reasonable accommodation for Plaintiff’s disability-
15 related difficulties in getting to work.

16 The Court finds that there is a genuine issue of material fact as to whether
17 Defendant failed to accommodate Plaintiff’s disability by moving him to new office
18 space and through the removal of Plaintiff’s parking pass. Therefore, Defendant’s
19 Motion for Summary judgment of Plaintiff’s failure to accommodate claim is

20 **DENIED.**

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1 **IV. CONCLUSION**

2 For all the foregoing reasons, the Court **DENIES** Plaintiff's Motion for
3 Summary Judgment, and **DENIES in part** and **GRANTS in part** Defendant's Motion
4 for Summary Judgment. Dkt. ## 30, 34.

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6 Dated this the 28th day of December, 2017.

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8 A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

9 The Honorable Richard A. Jones
10 United States District Judge
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